

## PERSPECTIVES

# Prof. Bickel and the Warren Commission

By Leo Sauvage

AFTER TWO years of blind adoration—probably unprecedented in a country where conformity is not physically enforced—American intellectuals are now discovering that something was wrong with the Warren Commission Report, and thus with the Commission itself. The most recent manifestation of this phenomenon is a long article by Alexander Bickel of Yale University in the October issue of *Commentary*. It is called "The Failure of the Warren Report," and one of its purposes seems to be to justify the professor's long silence. "Before [Edward Jay] Epstein's book [*Inquest*, Viking, 1966] was published," he writes, "virtually everyone who commented in print accepted the Commission's assurance that it was 'not necessary to any essential findings' to choose between the one-bullet and two-bullet hypotheses."

I mention all this here, first, because it happens that I rejected the "Commission's assurance" in print in *THE NEW LEADER* of November 22, 1965 ("The Warren Commission's Case Against Oswald"), commenting that I found such an opinion "thoroughly stupefying." In addition, many of the issues raised by Professor Bickel concern points

raised by me in the article cited as well as in a companion piece ("Oswald's Case Against the Warren Commission," *NL*, December 20, 1965), both of which were subsequently included in my book *The Oswald Affair*, published earlier this year by World.

More than anything else, I think, it was the remarkable silence of men of Bickel's stature that compounded "the failure of the Warren Report." Yet this apparently has not inspired any modesty on the part of the professor. In fact, the bulk of his article is devoted to discrediting the Commission's critics, though Mr. Bickel more or less admits that without them, or without Epstein at least, he would still be among those who received the Warren report "with rhapsodic relief."

In criticizing Epstein because he "makes something" of the testimony rejected by the Commission, Alexander M. Bickel musters all his authority as Chancellor Kent Professor of Law and Legal History to lecture the delinquent Harvard student: "Uncorroborated eyewitness testimony is unreliable even as to general impressions received at close range, and the more so as to detail observed at a distance. This is a first wisdom in the investigation of crime." Indeed it is. But why

didn't the professor recall that rule to the members and lawyers of the Warren Commission, whose Report overflows with blatantly uncorroborated eyewitness testimony.

Turning to me, Professor Bickel writes: "Mr. Sauvage remarks that 'it would not be an exaggeration to suppose that among the evidence gone undetected [by the Dallas police during their examination of the sixth floor of the Texas School Book Depository Building] were the footprints, the fingerprints, the gloves, the handkerchief, the calling card of another suspect—or even this other suspect himself, in person.' But an exaggeration it would be, and quite an exaggeration, for the Dallas police did find the rifle and other clues left behind by Oswald." (The passage in brackets is Bickel's. —L.S.)

To the reader who does not know *The Oswald Affair*, it must appear that Professor Bickel has delivered a telling, if not final blow: I am a man given to wild exaggerations, utterly irresponsible. And in the framework delimited by the professor's choice of weapons, my irresponsibility is really worse than he indicates; for contrary to the interpretation he offers in the passage between brackets, the "evidence gone undetected" involved not only

the Dallas police but the FBI as well.

The statement isolated by Mr. Bickel, however, belongs to the chapter of my book entitled "The Clipboard Mystery," and that begins as follows: "If one accepts the suggestive picture provided by the Report, and if one recalls the discovery of the clipboard 10 days afterward in the room 'searched' by Dallas police, deputy sheriffs, and Secret Service and FBI agents, it would not be an exaggeration to suppose...." The clipboard, we were told, had been "hidden by book cartons in the northwest corner of the sixth floor at the west wall a few feet from where the rifle had been found."

It is amazing and appalling that a man like Alexander M. Bickel, confronted with a dilemma that should have been as obvious to him as it was to me, prefers to object to the tone of my reaction rather than demand an explanation from the Warren Commission. The dilemma is very simple; here is how I stated it in the book: "Either the sixth floor was never thoroughly searched, or evidence tending to incriminate Oswald was placed there after the search."

But let's look at that fantastic episode the way Bickel wishes to remember it, or to forget it. Footprints, fingerprints, gloves, a handkerchief would certainly be easier to hide than a 12" x 9" board with a large metal clip on one end. A calling card, for example, would be only about 3.5" x 2". So is it really "quite an exaggeration," professor?

And what about "this other suspect himself, in person?" Even interpreting Mr. Bickel again literally, it could be noted that according to the manager of the Texas School Book Depository, Roy Truly, there was at least one unidentified "reporter" on the sixth floor after the assassination. He startled Truly by asking: "What about this fellow Oswald?" As to the "rifle and other clues left behind by Oswald" on that same sixth floor, Mr. Bickel still has

no proof except the Commission's word that the rifle was left behind by Oswald. Is he aware that among the various contradictory statements made in the Report about prints, there is the admission that "one identifiable palmprint was not identified"?

**H**AVING THUS disposed of the "Clipboard Mystery," Professor Bickel wonders "why an otherwise responsible newspaperman would wish to go to such lengths in order to avoid facing up to so much of the truth as we can be fairly confident we know." Well, I wonder how an otherwise responsible—and eminent—professor of law can feel "fairly confident" that he knows any part of the truth when his examples of that truth show he knows practically nothing.

1. "The Commission established that Oswald owned the rifle that was found near the sixth floor window at the southeast corner of the Texas School Book Depository Building," Bickel says. The rifle was found in the opposite northwest corner. But in any event, since when is ownership of a weapon—even if it is unquestionably identified as a murder weapon, which was not the case here—sufficient proof of guilt?

2. "There was ballistics evidence that the whole bullet found on the stretcher in Parkland Hospital and two fragments recovered from the limousine were fired out of this rifle." Yes, but were they the bullets which hit the President? The Commission affirms that "the" stretcher was Governor Connally's. The "whole bullet" (or "nearly whole" bullet, as the Report says) could therefore *not* have been one of those which hit the President unless it was an incontrovertible fact that it also hit the Governor. The Report does not dare go beyond the word "probability," and Professor Bickel does not even seem to go that far. In short, the "ballistics evidence" has no probative value, because tracing the bullet to the rifle is cer-

tainly not the same as tracing it to the victim. I said this in my book, but Professor Bickel chose to ignore it.

3. "There is nothing to connect this rifle with anyone else." Contrary to a grossly misleading statement in the Report (which according to Edward Epstein, disturbed assistant Commission counsel Wesley J. Liebeler, but apparently did not impress Professor Bickel), nobody knows *when* the rifle disappeared from the garage of the Paine home in suburban Irving where Marina Oswald was staying. Since the Report establishes that Marina couldn't tell whether or not the rifle was inside its blanket during the weeks prior to the assassination, it could have been taken by *anybody* during that time. The garage was easily accessible.

4. "The night before the assassination, Oswald made an unusual trip from Dallas to the [Paine] house...." The Warren Report explains that Oswald wanted to make up with his wife, who for several days had refused to talk to him on the phone. I am satisfied with that explanation. If Bickel is not, and if he continues to find the trip "unusual" despite the Commission's explanation, he should say why.

5. "He was seen carrying a long package...." Like the Warren Commission, Bickel dismisses the only two existing witnesses to this because their testimony does not fit his conclusion. But he tries to minimize the contradiction by stating that the bag Oswald was supposed to have been carrying met "the witnesses' description, except for length." That would be bad enough, since the length of the bag (as compared with the length of the rifle, even disassembled) is precisely what matters. In addition, though, Bickel's statement is untrue: As the witnesses saw it, the bag certainly did not look like a grocery bag, nor did they notice any tape. In fact, it was contrary to their description in

every aspect, except color, which does not mean much because this brownish color is common to most types of wrapping paper and paper bags used everywhere in the world.

Naturally, Bickel also ignores the mystery surrounding the discovery of the bag (it was not mentioned—and apparently not seen—by the first policemen to enter the sixth floor, and there is no photograph showing the bag in the open space near the window where it was said to have been found). Nor does Bickel's way of facing the truth include any questions about when, where and how the disassembled rifle was reassembled in time and with sufficient precision for the assassination.

6. "Oswald was in the building and was seen on the sixth floor before noon. . . ." That's where he was supposed to be, professor, or have you forgotten that Oswald was an employee of the Texas School Book Depository? Because of the infamous Dallas broadcasts and because the Warren Commission did its best not to dispel the misunderstanding, millions of Americans—including, one gathers, Professor Bickel—have been convinced that Oswald was *alone* in the building at the time of the assassination. But it has been established that no less than 20 persons could be identified as having been inside the building at that time, and there may be some unknowns too; as the Commission observed, anyone was able to walk out of the building at will for many minutes afterward.

7. "Oswald then left the building, went to his rooming-house to pick up a revolver. . . . When arrested, he had the revolver in his possession. This much about his movements after the assassination is undeniable. . . ." Allow me, professor: What do you call "undeniable"? There is not a shred of proof that Oswald picked up a revolver at the rooming-house; Mr. Bickel's affirmation here is as irresponsibly gratuitous as was the Commission's.

And there is no legally acceptable proof that Oswald had the revolver in his possession at the time of his arrest. The whole story of the arrest, as presented by Dallas policeman McDonald, is utterly incoherent; and the absence of confirmation from any of the spectators at the Texas Theater has disturbed even the *New York Times*. The man who is supposed to have taken the revolver from Oswald is Dallas detective Bob Carroll. When asked who was holding the revolver when he grabbed it during the scuffle in the movie house, he answered (Hearings VII, 20): "I don't know, sir. I just saw the pistol pointing at me and I grabbed it and jerked it away from whoever had it and that's all. . . ."

PROFESSOR Bickel finds "it is characteristic of Mr. Sauvage's manner of argument that he wants the Commission to have proved why Oswald could have admitted owning the revolver, while steadfastly denying ownership of the rifle." The professor, of course, has the answer: "Well, he was caught red-handed with the revolver."

At this point one might have expected the Chancellor Kent Professor of Law and Legal History at Yale to at least remark in passing on the validity of "admissions" made by—or rather attributed to—a suspect not only in the absence of a lawyer but without any record of the exact words. Unfortunately, Professor Bickel is too busy tackling the critics. Well, Oswald was *not* caught red-handed with the revolver. But he was faced—that is, almost caught red-handed—with the false identification papers in the name of Hidell found in his wallet, with the photographs showing him with the rifle, and with the order form for the rifle in his hand writing. Yet he denied everything, everything except the revolver, about which he volunteered the information, according to Captain Fritz, before the question was even

raised. I must say that the Commission, in this instance, appears much less at ease than Professor Bickel; the Report discreetly relegates the alleged "admission" to a single paragraph of six lines, without including it in its final summary. Obviously, unlike Mr. Bickel, the Commission did not consider the "admission" a major element of "so much of the truth as we can be fairly confident we know."

What has contributed most to undermining my esteem for Professor Bickel, though, is the intolerably flippant way in which he deals with the fact that Oswald was seen by two witnesses in the second-floor lunchroom so soon after the shots were fired from the sixth floor. The question inevitably arises whether he could have been the man who fired the shots. Yet Mr. Bickel sneers, "Mr. Sauvage tries to turn this incident into an alibi for Oswald." Mr. Bickel thinks it is more becoming for a professor of law, if not for a newspaperman, to accept the way the Warren Commission twisted the "incident" into a proof *against* the accused man—who in effect was convicted by Executive fiat without trial or defense.

I first raised the matter of Oswald's possible alibi in March 1964, in the same magazine where Professor Bickel now scornfully dismisses it. And only after the publication of my *Commentary* article, already entitled "The Oswald Affair," did the Warren Commission feel moved to make the necessary verifications neglected by both the FBI and the Dallas police. Since he does not even mention it, Mr. Bickel obviously attaches no importance whatsoever to the stunning revelation that one of the two reconstructions of the assassination staged by the Commission *actually gave Oswald an alibi*: It showed that if he had done the shooting from the sixth floor, he would have reached the lunchroom three seconds after Roy Truly and patrolman Baker.

Bickel is satisfied that Baker, on the day of the assassination, "probably took longer than he did during the reconstruction." This comforting explanation was extracted from Baker by assistant Commission counsel David W. Belin, though it is flatly contradicted by Baker's spontaneous statements. For example, far from having to "jostle through a crowd," as Mr. Bickel would have us see it, Baker, who was "180 to 200 feet" away when he heard the shots and saw "pigeons flutter upward" from the building, "revved that motorcycle up" and stopped in front of the building while people were still "falling and rolling around down there." He then "ran straight to the entrance" and followed Truly inside at such a speed that when Truly stopped at the swinging door leading to the main room on the ground floor, Baker "bumped into Truly's back."

There is, of course, the reconstruction which has Oswald arriving at the lunchroom 16 seconds before Baker. But to obtain this result, the Commission shortened Oswald's time and lengthened Baker's by arbitrarily altering the circumstances. I shall cite only three examples of how this was done, in the hope that Professor Bickel will either provide me with a valid justification for the Commission's action or support me in asking that the Commission provide one.

1. The Warren Report denies Oswald's affirmation—as quoted by his interrogators and repeated in the public statements of Dallas authorities—that he was holding a coke bottle when Baker saw him in the lunchroom. Since getting the bottle from the machine would have taken several seconds, the Commission has thus contributed that number of seconds to the 16-second margin of its reconstruction, separating Oswald from an alibi. *Question:* Why is it that on September 23, 1964, four days before publication of the Report, patrolman Baker

said in a hand-written statement to FBI agent Richard J. Burnett, before crossing it out (see Commission Exhibit No. 3076, XXVI, 679), that when he saw Oswald in the lunchroom the man was "drinking a Coke"?

2. Though the Report is contradictory and misleading about this, a check of Volume III of the Hearings, describing the modalities of the reconstruction, indicates that the stopwatches were left running for Baker until he reached the lunchroom, or even until Truly joined him there. But the disposition of the second floor, as shown in the diagram provided by the Report (Commission Exhibit No. 1118), made it impossible for a man coming down the stairs to reach the lunchroom without being seen crossing the second floor landing. This means that Baker would have to have seen Oswald even before he was able to enter the lunchroom, or at the moment Baker reached the second floor landing—and the stopwatches should have been stopped at that moment. *Question:* When were the stopwatches stopped?

3. The rest of the 16 seconds was obtained by a method which, without a satisfactory explanation, must be branded as plain cheating: Baker, from the moment he got off his motorcycle to the moment he reached the lunchroom, was made to walk. This is clearly contrary to any logic, for a policeman pursuing the assassin of the President of the United States does not walk. It is also contrary to what Baker himself said about his movements on the day of the assassination. He mentioned several times and on different occasions that he was "running." Finally, it is contrary to what the Warren Report says in Commission Exhibit No. 1118, where the staircase in the northwest corner is indicated as follows: "Patrolman Baker and Mr. Truly ran up these stairs from 1-st floor." *Question:* Why was Baker invited to walk and

not run in this reconstruction, when during the actual event he was running?

**O**NE COULD continue, but space limitations make it impossible to detail here all the other misstatements and misinterpretations Professor Bickel indulges in as he goes on peddling (sorry, but I am borrowing here from the professor's own vocabulary) Lee Harvey Oswald's guilt.

"This," Mr. Bickel says, "is no Sacco-Vanzetti, and no Dreyfus case. No innocent man stands convicted. . ." Well, Oswald *lies* convicted, and how does Professor Bickel know he is *not* innocent? "It has become clear," he admits at the beginning of his article, "that far from having 'satisfied itself that the truth is known,' the Commission scarcely even evaluated 'all the facts and circumstances.'" He has even discovered, rather belatedly, that the Commission was "a particularly bad one." Yet he maintains that disagreeing with the Commission's conclusions "demands an increasingly fierce resistance to reality," then, practically in the same breath he confirms that his personal conviction of Oswald's guilt, which is what he calls "reality," has not been supported by the Warren Commission "beyond a reasonable doubt."

I recommend to the eminent professor of law the following statement made by Léon Blum in his *Souvenirs sur l'Affaire*: "Nothing is less frequent, nor more difficult, than to prove innocence *positively*, and that is why, in any civilized system of justice, *negative* proof suffices. I am innocent if I have invalidated, in front of the judge, the evidence brought forward by the accusation." May I add respectfully—no, not respectfully—that it was a good thing for justice, for the reputation of France and for Alfred Dreyfus, that in Paris in 1898 there was an Emile Zola rather than an Alexander Bickel?